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April 5, 2002

REDACTED CONFIDENTIAL FILING – REDACTED FOR PUBLIC INSPECTION

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APR - 5 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William Caton
Acting Secretary
Federal Communications Commission
455 12th Street, SW
Washington, D.C. 20554

Re: REACTED FOR PUBLIC INSPECTION – SUBJECT TO PROTECTIVE ORDER IN CC DOCKET NOS. 01-338, 96-98, 98-147 – Comments of NewSouth Communications, Redacted Confidential Filing

Dear Mr. Caton:

NewSouth Communications, through its attorneys, hereby submits this Redacted Confidential Filing of the Comments New South Communications in the above-referenced proceeding, along with four copies as required by the *Notice of Proposed Rulemaking*. These comments are being filed pursuant to the *Protective Order* adopted by the Commission in this proceeding.[1] As per the instructions in the *Protective Order*, a second copy of this Redacted Confidential Filing is being with your office. The Confidential Filing has also been filed with your office under separate cover letter and a copy of the Confidential Filing has been delivered in person to Janice Myles, Competition Policy Division, Wireline Competition Bureau.

Please contact the undersigned if you have any questions.

Sincerely,

Michael H. Pryor
Christopher R. Bjornson
Counsel for NewSouth Communications

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List ABCDE

[1] Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, and 98-147, *Order*, DA 02-273 (rel. March 27, 2002).

cc: Dorothy Attwood
Michelle Carey
Tom Navin
Kyle Dixon
Jordan Goldstein
Matt Brill
Dan Gonzalez

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

COMMENTS OF NEWSOUTH COMMUNICATIONS

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April 5, 2002

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	)	

COMMENTS OF NEWSOUTH COMMUNICATIONS

NewSouth Communications ("NewSouth"), submits these comments in response to the Notice of Proposed Rulemaking ("Notice") in the above captioned proceeding.[1/] The Notice initiates the Commission's first triennial review of its rules implementing the unbundling obligations set forth in sections 251(c)(3) and 251(d)(2) of the 1996 Telecommunications Act ("1996 Act").

I. INTRODUCTION AND SUMMARY

The promise of local competition, investment, and innovation embodied in the 1996 Act is only now beginning to take root. One reason that the promise of the 1996 Act has been delayed is that the 1996 Act's unbundling obligations, and the Commission's implementing rules, have never been fully implemented. This has thwarted one of the principal objectives of the 1996 Act -- to promote the rapid development of competition in the local telecommunications

1/ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, 96-98, 98-147, Notice of Proposed Rulemaking, FCC 01-361 (rel. December 20, 2001) ("Notice").

market.[2/] A crucial tool in achieving that objective was to enable new entrants to obtain nondiscriminatory access to unbundled elements of the incumbent LECs' networks. As noted by Eighth Circuit Court of Appeals, the Act "provides for unbundled access to incumbent LECs' network elements as a way to jumpstart competition in the local telecommunications industry."[3/]

Unfortunately, the promise of rapid local competition facilitated by access to UNEs has yet to be fulfilled. Although the Commission initially adopted its unbundling rules in August 1996, UNEs have never been fully available in the real world. The Commission recognized this fact in the *UNE Remand Order* where it noted that, "[b]ecause unbundled network elements have not been fully available to requesting carriers as the Commission expected in 1996, we do not yet know the extent to which competition will develop once all of the unbundling rules are actually implemented by incumbent LECs."[4/]

Nearly another three years has passed since the *UNE Remand Order* and UNEs are still not fully available to the extent required by the 1996 Act and the Commission's implementing rules. States are *still* in the process of determining the appropriate, TELRIC-based, prices for UNEs. New York and New Jersey, for example, recently reduced UNE rates following lengthy proceedings. As a result of those proceedings, many UNE rates were significantly reduced, but even in such states pricing *still* remains an issue.[5/] In the nine-state southeast region where

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2/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, FCC 99-238, ¶ 107 (rel. Nov. 5, 1999) ("*UNE Remand Order*")

3/ *AT&T Corp. v. Iowa Utilities Bd.*, 120 F.3d 753, 811 (1999).

4/ *UNE Remand Order* ¶¶ 11-12.

5/ *See, e.g.*, Application by Verizon for Authorization to Provide In-region, InterLATA Services in New Jersey, CC Docket No. 01-347, Supplemental Comments of WorldCom, Inc. at 6-8 (filed March 13, 2002) (describing excessive switching rates in New Jersey); Application by Verizon for Authorization to Provide In-region, InterLATA Services in New Jersey, CC Docket No. 01-347, Supplemental Comments of AT&T Corp. at 7-15 (filed March 13, 2002) (describing excess UNE hot cut rates in New Jersey).

NewSouth operates, Florida *still* has not set UNE rates for Verizon/GTE, and Tennessee has only recently established cost-based rates for BellSouth.[6] Excessive UNE rates *still* effectively preclude the use of UNEs as a broadbased entry strategy, particularly for mass-market consumers, in a number of states.

The lack of forward-looking, cost-based UNE prices that actually enable entry is one major reason why UNEs have not been fully available in any practical sense, but it is far from the only major impediment that the ILECs have imposed in the way of competition. The Commission's implementing rules have been tied up in litigation from the moment they were first promulgated. As of the date of this filing, significant issues still remain up in the air, including the scope of incumbent LECs' obligations to combine network elements not already physically attached in the network. The Commission's restrictions on EEL availability -- and the incumbent LECs' overly aggressive reading of those restrictions -- have severely limited the ability of competing carriers to enter the market utilizing loop/transport combinations. The general failure of EELs has been particularly discouraging because they had the potential to facilitate and expand entry by switch-based carriers.

Incumbent LEC gamesmanship has also hampered UNE access. Incumbent LEC stalling tactics include requiring unnecessary or onerous amendments to interconnection agreements before the incumbent LEC will make UNEs available or denying UNEs on grounds that facilities are unavailable or "new construction" is required when, if fact, only minor equipment modifications are needed. Finally, non-discriminatory access to UNEs has been delayed and hampered for years due to unresponsive or under-performing operations support systems, which

6/ Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements, Docket No. 97-01262, *Final Order*, at 20-21 (Tenn. Reg. Auth. Feb. 23, 2001).

only recently have begun to support some level of robust entry. Indeed, BOCs have thus far demonstrated that they provide nondiscriminatory OSS in only the 10 states in which they have received section 271 authority.

The unfortunate but inevitable consequence of these events is that the Commission still does not have a reasonable baseline from which to assess the efficacy of its unbundling rules or to fully gauge the effectiveness of unbundled network elements as a meaningful vehicle for competitive entry. Instead of entertaining incumbent LEC arguments that the availability of UNEs should be further curtailed, the Commission should instead concentrate its efforts on ensuring that the UNEs it has previously ordered to be unbundled actually are available in real, practical terms. Only after access to these UNEs has genuinely been practical for a reasonable period of time can the Commission properly reevaluate whether, and to what extent, the list of available UNEs should be curtailed. Otherwise, the ILECs will in effect be rewarded for having thwarted the Act and the Commission's rules, and Congress's goal of promoting local telecommunications competition will continue to be undermined.

Continued access to UNEs is critical to facilities-based companies such as NewSouth. NewSouth's entry strategy is consistent with the goals this Commission has often articulated. . The Commission, for example, has urged competitors to deploy facilities, provide broadband data services, and invest in systems, including electronic bonding, in order to more efficiently order services and unbundled network elements from the incumbent LECs and to effectively serve their own customers.

Additionally, the Commission has sought to encourage competitors to derive revenues from the sale of their services to end users, rather than by charging other carriers for access or reciprocal compensation. NewSouth has done just that. NewSouth has made a substantial investment in its own facilities, including the deployment of thirteen voice and fourteen data switches, and it has established eighty collocation arrangements in order to serve small and medium business customers in the Southeast. In addition, NewSouth has made significant investments in its own back office systems and recently deployed an electronic OSS gateway with BellSouth. Moreover, through substantial effort, NewSouth now receives approximately [redacted] of its revenue from retail customers and only about [redacted] of revenue comes from other carriers in the form of access charges or reciprocal compensation payments. As a result of its efforts, NewSouth is on target to reach positive EBITDA [redacted]

NewSouth's investment is bringing customers the benefits of competition promised by the 1996 Act. NewSouth has not limited its services to the largest customers or to the largest cities. NewSouth's primary product, a bundled package of voice and broadband services delivered over a DS1 local loop leased from the incumbent LEC, primarily is sold to small and medium sized businesses. NewSouth has not limited its services to the top tier markets, but rather is providing service in Tier IV markets such as Charleston, South Carolina, and Destin, Florida.

Perhaps most impressive is the fact that NewSouth is bringing advanced services to customers who could not obtain it from their incumbent carrier. NewSouth estimates that approximately ninety percent of NewSouth's retail customers served over DS1 loops have been upgraded from analogue services received from the incumbent to digital services provided by NewSouth, including broadband service. NewSouth also provides quality customer care, providing a dedicated customer account manager to assist customers in their communications needs. Thus, NewSouth brings not just price competition, but quality and variety of services as well.

NewSouth's success is, in large part, due to access to unbundled network elements. These elements include, but are not limited to, unbundled DS1 loops, enhanced extended links ("EELs"), and even the unbundled network element platform ("UNEP – a combination of unbundled DS0 loops, switching, and shared transport). These critical last mile facilities provide end users access to NewSouth's services, including broadband service. As NewSouth demonstrates below, access to unbundled loops (including DS1s), EELs, and UNEP are still crucial to delivering the benefits of the 1996 Act – competitive choice, investment and innovation, and deployment of broadband services. If the Commission curtails the use of UNEs, as the incumbent LECs seek, NewSouth's effort and investment will have been wasted. And NewSouth's customers will lose the benefits they receive in the form lower prices, more and varied services, and access to advanced services that they did not have from the incumbent carrier.

In Part II of these comments, NewSouth refutes the notion that access to UNEs deter facilities investment. NewSouth explains that it is a facilities-based provider that nonetheless is heavily reliant on incumbent LEC "last mile" network elements to reach its customers, and it is a facilities-based provider that also utilizes UNEP. The statute's unbundling obligations have enabled NewSouth to make substantial investments in switching and related equipment in order to provide voice and data services to small and medium sized businesses – an investment which may well become stranded without continuing access to the UNEs which made such investment possible in the first place. In Part III, NewSouth demonstrates with more particularity that it is impaired without access to high capacity (DS1) loops and EELs because there are no alternatives to such facilities outside the incumbent LECs' networks. NewSouth is also impaired without access to UNEP, which enables NewSouth greatly to expand its customer base and geographic reach. NewSouth demonstrates the devastating effect that the removal of DS1 loops, EELs and UNEP will have on NewSouth's ability to fulfill its business plan and continue to provide a true competitive alternative to the incumbent LEC, including bringing advanced services to customers who did not have access to such services before.

In Part IV, NewSouth identifies several critical steps that the Commission should take to ensure that the network elements it identifies in this proceeding are available as a practical matter. The Commission should : (1) clarify the rules concerning when incumbent LECs may refuse to provide UNEs on the grounds that they are "unavailable," and confirm that incumbent LECs must attach the electronics required to derive DS1 signals on a nondiscriminatory basis; (2) confirm that requesting carriers may convert special access stand-alone loops to UNEs; (3) eliminate co-mingling restrictions which the incumbent LECs have used to stifle competition and preclude that effective use of EELs; (4) provide that carriers need not collocate in order to obtain access to unbundled loops or EELs; and (5) establish a five-year quiet period to permit competitors to carry out their business plans with confidence.

In Part V, NewSouth urges the Commission to retain its general impairment analysis which appropriately focuses on the availability of network elements *outside* the incumbent LEC's network. Finally, in Part VI, NewSouth argues that the Commission should exercise caution in adopting a more granular impairment analysis. In particular, NewSouth submits that the Commission should not adopt pre-defined generic categories to determine impairment.

II. NEWSOUTH'S INVESTMENT IN FACILITIES DEMONSTRATES THAT UNBUNDLING FURTHERS THE GOALS OF FACILITIES INVESTMENT AND BROADBAND DEPLOYMENT

The Notice evidences the Commission's interest in ensuring that its unbundling rules provide the proper incentives for facilities-based competition, particularly for broadband services. The Commission seeks comment on whether this goal should be an explicit factor in its determination of what elements to unbundle. The Notice subsumes, under this general inquiry, a number of more specific questions designed to address arguments that the existing unbundling requirements create a disincentive on the part of incumbent LECs and competitive carriers to invest in new facilities, particularly those utilized to provide advanced services. It also seeks comment on what the Commission should consider to be "facilities-based" competition for purposes of the Act and this proceeding.[7/]

NewSouth believes that proper access to UNEs promotes rather than hinders facilities-based competition. NewSouth is a perfect example of how the unbundling obligations enable the investment necessary to provide such competition. NewSouth has made a significant investment in facilities capable of providing both traditional voice services and advanced telecommunications services. NewSouth has made these investments because of the unbundling requirements, not in spite of them. Rather than discouraging investment in new and innovative technologies, access to unbundled network elements, including combinations of elements, has enabled NewSouth to deploy a high-speed network capable of bringing voice and advanced services to small and mid-sized businesses throughout the Southeast. More specifically, without access to incumbent LEC high capacity loops and interoffice transport, NewSouth could not and would not have made this investment because there would have been no economically feasible method of delivering service to the end user.

The fact that NewSouth provides service to some customers using UNEP instead of its own facilities does not undermine the conclusion that NewSouth has made substantial investments because of the unbundling rules. Indeed, the availability of UNEP reinforces the

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7/ Notice ¶ 29.

point. As explained below, UNEP allows NewSouth to expand its customer base and geographic range. Through UNEP, NewSouth can serve customers it could not technologically or economically serve over its own platform. The revenue from UNEP has enabled NewSouth to make its facilities investment, and is vital in ensuring that NewSouth can continue to provide service to all of its customers, both UNEP customers and customers served by NewSouth's own switches.

As noted, the Commission seeks comment on what it should consider to be "facilities-based" competition.[8/] In analyzing this question, it may be helpful to understand what NewSouth means when it says it is a facilities-based carrier. NewSouth's network consists of four main parts: (i) digital circuit switches and packet switches; (ii) lit intercity fiber leased from third parties to connect these switches with each other;[9/] (iii) equipment collocated in incumbent LEC central offices and on customer premises; and (iv) a network control center and back office customer care and billing platforms. NewSouth submits that this investment clearly constitutes facilities-based competition.

Moreover, it is facilities investment that has brought substantial benefits to consumers. NewSouth is able to attract customers because, through the facilities it has deployed, it can offer customers a value proposition that exceeds what they currently receive from the incumbent. This value proposition involves not only better prices, but also more and varied services, including advanced services.[10/] NewSouth offers businesses, even smaller businesses, the ability to obtain sophisticated advanced services, such as high-speed Internet access, web hosting, and private

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8/ Notice ¶ 29.

9/ NewSouth purchases intercity transport from third party suppliers, not an incumbent LEC, to connect its thirteen voice and fourteen data switches.

10/ NewSouth offers basic local and long distance services at prices fifteen to twenty percent below the incumbent's prices.

networking services ranging from point-to-point dedicated transmission to high-speed, secure, virtual private networks for data transmission such as LAN-to-LAN and WAN-to-WAN connections and teleconferencing capabilities.

In fact, approximately ninety percent (90%) of NewSouth's retail customers served over DS1 circuits did not have access to high-speed data services from the incumbent LEC. Instead, these customers were previously served by the incumbent LEC via analog service. Thus, NewSouth's ability to compete with the incumbent LEC using unbundled DS1 loops has had the added benefit of increasing the availability of advanced services – one of the key goals of the 1996 Act.

These benefits are not limited to Tier One markets. Although NewSouth offers service in markets such as Atlanta and New Orleans, NewSouth primarily targets small and mid-sized towns and cities. NewSouth offers competitive alternatives in cities such as Anderson, South Carolina; Biloxi, Mississippi; Clarksville, Tennessee; Clearwater, Florida; Mandeville, Louisiana; and Roswell, Georgia.

The Commission further asks whether it should encourage investment in particular kinds of facilities and, for example, whether it is equally beneficial to encourage investment in transmission facilities as in switching facilities.[11/] NewSouth urges the Commission to avoid attempting to tailor unbundling rules to encourage specific types of facilities investment. Attempts to manipulate the market in this manner almost invariably lead to unintended consequences. In particular, the Commission should reject the incumbent LECs' tired assertions that unbundling discourages construction and deployment of fiber networks and that, therefore, all new fiber deployment should be immune from unbundling. Existing requirements that

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11/ Notice ¶ 29.

incumbent LECs unbundle local loop and transport facilities have not discouraged investment (except perhaps by the incumbent LECs themselves who seek to reap advantages in terms of lessened regulation by restraining their own investment). If anything, it appears that carriers have over-invested in transmission facilities. The carnage in the telecommunications industry is in no small part due to excessive debt loads incurred by carriers to build out their own fiber networks before they had a sufficient customer and revenue base. Indeed, the local loop distribution plant, including EELs, contains the greatest economies of scale of the incumbent LEC's network.

NewSouth has resisted the "Field of Dreams" approach of some carriers. Rather than engage in construction of transmission facilities with the hope that customers will be found to fill capacity, NewSouth's facilities strategy is to invest in the equipment that provides the intelligence in the network, *e.g.*, circuit and packet switches.[12/] Currently, this intelligence resides in the core of the NewSouth's network. At the edges of the network, NewSouth has invested in equipment that it collocates in incumbent LEC central offices and on the customer premises. This equipment essentially performs translation functions that enable NewSouth to transport the customer's traffic over the leased DS1 loops and transport facilities to NewSouth's switch platform. As will be explained further below, NewSouth is investigating moving some of this intelligence to the edge of its network by investing in micro switch technology that would

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12/ NewSouth strategy does not involve trenching in order to lay fiber. Instead, NewSouth relies on the transmission facilities of other carriers, incumbent LECs in the "last mile," incumbent LECs (or alternative carriers, if available) for backhaul to NewSouth's switches, and alternative carriers for intercity transport that links NewSouth's switches. By leasing, rather constructing its own transmission facilities, NewSouth avoids certain sunk costs. The cost of constructing fiber dedicated to a particular customer is irretrievably lost if NewSouth loses that customer. This Commission has long recognized that such sunk costs constitute a barrier to entry. *See, e.g.*, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, FCC 96-325, ¶¶ 10-15 (rel. Aug. 8, 1996) ("*Local Competition Order*").

reside in NewSouth's collocation arrangements. Moving intelligence to the edge of the network would reduce NewSouth's need for transport to backhaul traffic to its main switches, and thus reduce transport costs. (It would not, however, reduce its need for unbundled local loops and for unbundled transport between the central office and the customer). Additionally, using micro switches would enable NewSouth to purchase smaller scale customer premises equipment, further reducing costs. Reducing transport and customer premises equipment costs would enable NewSouth to provide service to customers whom it cannot now economically serve except through UNEP, as explained below.

The fact that NewSouth has limited its investment to switching equipment (and related investment in network control and customer care platforms) does not mean, and should not mean, that it is not a facilities-based carrier. The investment that NewSouth has made to purchase circuit and packet switches, network control and customer care systems, and customer premises equipment and collocated equipment is substantial. To date, NewSouth's capital investment in its network [redacted]. NewSouth thus far has deployed eleven Lucent 5ESS® AnyMedia™ circuit switches and two Seimens EWSD circuit switches at [redacted] NewSouth has also deployed fourteen Cisco BPX™8680 multi-service wide-area packet switches in its network backbone at a cost of [redacted] These packet switches are NewSouth's on-ramps to the Internet backbone, through which it provides Internet services and other packet-based data services to its customers. Additionally, NewSouth has invested nearly [redacted] to collocate equipment in (currently) 80 incumbent LEC central offices.[13] It has invested more than [redacted] in customer premises equipment, back office customer care systems and a network control center.

NewSouth believes that its investment in switching equipment, collocation, and operational and customer care systems certainly should qualify as a facilities-based for purposes of the Act and this proceeding. As explained below, however, NewSouth must have access to incumbent LEC last mile facilities in order to connect its network to its customers. Without such access, NewSouth's investment may well be lost – along with the benefits of competition it currently brings to the customers it serves.

III. NEWSOUTH'S ABILITY TO PROVIDE SERVICES, INCLUDING ADVANCED SERVICES, TO ITS CUSTOMERS WOULD BE IMPAIRED WITHOUT CONTINUING ACCESS TO UNES

NewSouth will be impaired in providing the services it seeks to offer without continuing access to unbundled DS1 loops, EELs and UNEP. Although NewSouth must also have access to other UNEs, OSS most notably, it will focus these comments on its need to obtain "last mile" facilities to reach its customers, including UNEP. Without such access, NewSouth's investment in switches and related equipment will be wasted. NewSouth will be impaired without access to DS1 loops and EELs for the simple reason that there are no alternatives available outside the incumbent LECs' network to replace these network elements. The services that NewSouth provides are *not* subject to intermodal competition. The only choice that the business customers have for the types of services that NewSouth provides are other wireline telecommunications carriers and, in many cases, the only alternative available to customers is the incumbent LEC.

13/ NewSouth has collocated primarily in BellSouth central offices but also has collocated in Verizon (former GTE) central offices and Sprint (ILEC) central offices as well.

A. NewSouth is Impaired Without Access to High Capacity Unbundled Loops and EELs

To connect NewSouth's switch platform to its customers, NewSouth must rely on incumbent LEC high capacity (DS1) local loops and, where available, EELs. NewSouth uses unbundled DS1 loops to provide services primarily to small- and medium-sized businesses that utilize a PBX or key system on their premises.[14/] Although NewSouth does provide service to a relative handful of larger business, NewSouth's primary business focus is the small to medium-sized customer that utilizes at least twelve voice lines or ten lines, at least four of which are data lines each data line having a minimum speed of 384 kbps. Overall, the average NewSouth DS1 loop contains seventeen voice and/or data lines.

To deliver its services to the customer, NewSouth installs equipment on the customer premises that acts as interface between the customer's PBX or key system, or router, and the DS1 loop facility that NewSouth leases from the incumbent LEC.[15/] The diagram attached as Exhibit 1 shows a typical arrangement at the customer premises. NewSouth also collocates companion equipment in incumbent LEC central offices where the DS1 loop terminates. The diagram attached as Exhibit 2 provides an illustration of a typical collocation arrangement. NewSouth then obtains transport from the collocation site to its switch.

NewSouth has also started to use EELs where available to extend the reach of its collocated facilities. Without EELs, NewSouth would be limited to serving customers that subtend the central offices where NewSouth is collocated. EELs enable NewSouth to provide

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14/ Typically the customer will already have PBX or key system on the premises. NewSouth will also obtain such systems for a customer as needed.

15/ This equipment typically consists of Adtran Channel Bank Unit (CBU) or Channel Service Unit (CSU). A CBU is a multiplexing device that sits between a DS1 loop and PBX or Key System if the PBX will not take a digital signal. The CBU places many analog voice conversations or analog data applications (e.g., fax or modem) onto one high-speed link like a DS1 and controls those conversations or applications.

service to many more customers. Indeed EELs have the potential to expand from 80 to 800 the number of incumbent LEC central offices from which NewSouth can serve customers.

NewSouth utilizes EELs to provide service to its customers in the same manner as with stand-alone DS1 loops. NewSouth places equipment at the customer premises to interface with the customer's PBX or key system and a leased DS1 loop. However, instead of terminating directly at a NewSouth collocation arrangement, the DS1 loop "terminates" at an intermediate incumbent LEC central office where it is cross-connected to incumbent interoffice transport, which in turn terminates at a NewSouth collocation arrangement. In fact, NewSouth views an EEL as an unbundled loop with a distance sensitive pricing component – with the same functionality as an unbundled loop. NewSouth typically utilizes a DS1 level signal for both the loop and transport component of the EEL.

1. <u>There are No Alternative Loop/Transport Facilities Outside of the Incumbent LEC's Network and NewSouth Cannot Economically Self-Provision Last Mile Facilities</u>

NewSouth is unaware of any alternative sources of local loops from third party providers that are available to reach its customers in any of the eighty central offices in which NewSouth is currently collocated. There are simply no alternatives available to NewSouth outside the incumbent LEC's network to reach customers. Impairment here is not a complicated story. NewSouth cannot obtain facilities between its collocation site and its customers from *anyone* else beside the incumbent. In those isolated instances where third-party carriers have built facilities to the buildings in which NewSouth's customers are located, those carriers have not made those facilities available to NewSouth.

Nor can NewSouth self-provision DS1 loops to reach its customers. In this proceeding, the Commission has asked specifically whether high-capacity loops (DS1 or higher) should continue to be unbundled or whether competing carriers can be expected to self-provision such facilities. The former is clearly the correct answer.

In the past, the Commission has found that self-provisioning is not a viable alternative to incumbent LEC's loop plant "because replicating an incumbent's vast and ubiquitous network would be prohibitively expensive."[16/] Importantly, the Commission found that this conclusion applied equally to high-capacity (DS1 and higher) loops. The Commission noted that building a loop is "expensive and time-consuming, regardless of its capacity."[17/] The Commission correctly recognized that requiring competitors immediately to duplicate the incumbent LECs' outside plant would delay, if not prohibit, market entry and postpone, perhaps indefinitely, the competition that the 1996 Act seeks to foster.[18/] The Commission recognized that permitting competitors to purchase unbundled loops enables a smart build strategy and avoids the substantial risk of the loss of sunk investment should the competitor lose the customer to whom it has constructed dedicated loop facilitities.[19/] The Commission noted as well that, apart from financial considerations, requiring competitors to construct their own loop plant would "embroil the competitors in lengthy rights-of-way disputes, and require the unnecessary digging up of streets."[20/]

These conclusions continue to be correct. The factors which the Commission identified as effectively precluding the duplication of the incumbent LECs' loop plant are equally true in today's market as it was when the *UNE Remand Order* was released, and as it was three years before that when the *Local Competition Order* was released. Indeed, if anything, experience in

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16/ *UNE Remand Order* ¶ 182.
17/ *Id.* ¶ 184.
18/ *Id.* ¶ 182.
19/ *Id.* ¶¶ 182-83.
20/ *Id.* ¶ 186.

the intervening years has shown that the market has severely punished carriers that invested too much in network facilities in advance of securing a stable, profitable customer base. Company after company that incurred substantial debt to finance the construction of alternative networks has floundered or is barely surviving. Moreover, the availability of capital to new entrants that wish to pursue such a self-provisioning strategy is far more constrained than it was before.

2. The Availability of Tariffed Services Is Not an Alternative to UNEs for Impairment Analysis Purposes

The Commission requests comment on whether the availability of tariffed service offering should play a role in the Commission's unbundling analysis. As the Commission well knows, the network elements that fit within the definitions of unbundled loops and unbundled dedicated interoffice transport are also available as tariffed services, for example as channel terminations and interoffice transport under incumbent LECs' special access or private line tariffs. The Commission has consistently and properly held that the availability of these network elements in the form of tariffed services is irrelevant to the impairment analysis. The impairment analysis, as noted above, focuses on the viability of self-provisioning or obtaining elements from "third-party providers."[21/] Both in the *Local Competition Order* and in the *UNE Remand Order,* the Commission firmly and soundly rejected incumbent LEC arguments that they should not be required to provide unbundled network elements if the requesting carrier could provide service using the incumbent LEC's tariffed services.[22/]

The Commission articulated several sound policy grounds for rejecting these incumbent LEC arguments. The Commission noted that allowing incumbent LECs to deny access to UNEs solely or primarily on the grounds that UNEs could be obtained as a tariffed service would

21/ *UNE Remand Order* ¶ 66.

22/ *Local Competition Order* ¶¶ 286-87; *UNE Remand Order* ¶¶ 67-70, 354.

permit incumbent LECs to avoid their unbundling obligations and foreclose competitive LECs from "taking advantage of the distinct opportunity Congress gave them, through section 251(c)(3), to use unbundled network elements."[23/] In the same vein, the Commission found that incumbent LECs could effectively remove from requesting carriers the choice of entering the market through UNEs or through resale of incumbent LEC services if availability of tariffed services negated the right to UNEs.

The Commission also noted that permitting incumbent LECs to deny access to UNEs based on the availability of tariffed services would leave competitive carriers vulnerable to incumbent LEC manipulation of the tariffed offerings. The Commission found that competitors would have no assurance that incumbent LECs could not alter tariff terms in such a manner that the competitive carrier could no longer rely on the tariffed offering to provide the services it seeks to offer.[24/] Additionally, the Commission noted that many of the services that competitors need would be in state tariffs, which the Commission could not practically monitor to ensure that those tariffs contained reasonable alternatives to unbundled elements.[25/] Moreover, relying on state tariffed offerings as substitutes for UNEs would, the Commission found, create inconsistent bundling rules among the states, which "would not promote the development of competition for all consumers."[26/] Finally, the Commission concluded that assessing impairment based on the availability of incumbent LEC services to the exclusion of availability of alternatives outside the network was inconsistent with the Supreme Court's decision.[27/]

23/ *UNE Remand Order* ¶ 67.
24/ *UNE Remand Order* ¶ 69.
25/ *UNE Remand Order* ¶ 69.
26/ *UNE Remand Order* ¶ 69.
27/ *UNE Remand Order* ¶ 70.

The reasons previously articulated by the Commission for rejecting incumbent LEC arguments that retail or tariffed services can negate the need for UNEs continue to be sound. Nothing has occurred in the marketplace to suggest that these rationales no longer retain force. Moreover, although the Commission in the *UNE Remand Order* addressed some of its concerns specifically to issues around state tariffs, many of the concerns would be equally applicable for federally tariffed services, such as special access tariffs. For example, the Commission's concern that permitting incumbent LECs to deny access to UNEs based on tariffed services would eviscerate the unbundling obligation applies equally to state or federally tariffed services. Additionally, as the Commission's oversight of federal special access services diminishes through policies such as pricing flexibility, the ability of the Commission to review incumbent LEC offerings, and require modifications, is reduced. Given that incumbent LECs retain market power over special access services, the incumbent LECs could alter the terms and conditions of special access offerings to harm competitive entry, and competitive LECs could be denied access to UNEs to counteract such anticompetitive conduct.

3. NewSouth Would be Impaired if Attached Electronics Were Not Included in the Definition of High Capacity Loops or Transport

The Commission's definition of a loop includes the attached electronics, except for those used to provide advanced services.[28/] The definition of dedicated transport also includes attached electronics.[29/] It is critical that the Commission retain these aspects of the definition of the unbundled loop and transport. The operational difficulties and increased costs that NewSouth

28/ 47 C.F.R. § 51.319(a)(1).
29/ *UNE Remand Order* ¶ 323.

would incur if it were required to purchase and install the attached electronics demonstrate that it would be impaired. [30]

Excluding attached electronics from the definition of an unbundled loop or dedicated transport would also impose significant operational constraints in providing telecommunications service to NewSouth's customers. In particular, NewSouth would be limited to providing DS1 service over copper loops less than 14,000 feet. In order to increase the service area, repeaters would have to be added to the loop. The repeaters must be compatible with the equipment NewSouth's would have to install in the central office and the customer premises to derive the DS1 signal. Thus, NewSouth would be at the mercy of the incument LEC in terms of what manufacutors the incumbent LEC has chosen for the necessary repeators. In addition, NewSouth's ability to test and trouble shoot the circuit without access to the repeators and other equipment within the incumbent LEC's network would be severly limited.

Finally, NewSouth estimates that the costs of self provisioning the necessary electronics in the central office to generate the DS1 signal would be approximately [redacted] – in addition to the cost of obtaining the loop and other costs already incurred in providing service. NewSouth currently has approximately [redacted] DS1 loops in operation. If the incumbent LEC were required to provide only a conditioned loop without the electronics, and NewSouth required to add the electronics, NewSouth could incur a total cost of approximately [redacted] Additionally, the added cost of providing the electronics would increase the time to recoup investment to install a customer by nine to twelve months.

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[30] NewSouth addresses the issue of requiring the incumbent to attach electronics not already attached in section IV. A. below.

B. NewSouth is Impaired Without Access to UNEP

Although NewSouth is a facilities-based provider and the majority of its customers are served via NewSouth's switching platform, utilizing incumbent LEC facilities for "last mile" connections, NewSouth also provides services to some customers using UNEP. Approximately 14% of NewSouth's lines are served via UNEP. UNEP enables NewSouth to serve customers that it could not economically serve utilizing DS1 loops or EELs.

With UNEP, NewSouth can economically provide service to customers needing fewer than four lines (in contrast to the at least 10 to 12 lines needed to economically provide service with DS1 loops.) UNEP thus enables NewSouth to provide service to smaller businesses, and to utilize mass marketing sales techniques that are less expensive than the direct marketing and fairly intensive customer interaction required to serve customers with DS1 loops or DS1 EELs. Thus, the availability of UNEP expands significantly the range of customers to whom the benefits of competition can be made available.

The availability of UNEP also enables NewSouth to serve customers with more ubiquitous transport needs. One example is businesses with multiple locations, such as a bank with a number of branches or ATM locations. Such customers typically seek to purchase all of their communications needs from a single supplier. NewSouth is able to provide full service to such a customer by using UNEP to connect to branches or ATM locations that are not served by central offices in which NewSouth is collocated, or which can be reached by EELs. Although NewSouth typically will provide service over DS1 loops to such a customer's main office, without UNEP to serve branch offices or other locations, NewSouth would not be able to attract this customer.[31/]

Finally, UNEP allows NewSouth to dramatically expand its geographic reach. Using just unbundled DS1 loops, NewSouth's addressable market is limited to customers that subtend the 80 central offices in which NewSouth is located. With EELs, NewSouth is able to extend this reach to over 800 wire centers. The practical use of EELs is limited, however, by the fact that the transport component of EELs is charged on a mileage-sensitive basis. There is thus an economic limit to the reach of EELs, as well as operational limitations. By using UNEP, customers served from 4,500 incumbent LEC wire centers are now accessible to NewSouth. The availability of UNEP thus allows NewSouth to provide a level of ubiquitous service that it cannot in the foreseeable future provide solely through unbundled loops or EELs.

The inability to provide service to these customers economically without UNEP is sufficient to demonstrate impairment – but the loss of UNEP would impair NewSouth in more fundamental ways. The availability of UNEP enables NewSouth to spread fixed costs over a larger group of customers. Incumbent LECs have enormous advantages in terms of economies scale and scope due to their existing customer base and infrastructure. The Commission has previously concluded that one of the primary purposes of UNEs is to enable new entrants to share in the economies of scale and scope that incumbent LECs enjoy by virtue of their previous *de jure* monopoly statutus – a status that continues *de facto* today.[32/] Moreover, as described in more detail below, the contribution of UNEP to NewSouth's overall cash flow is vital in meeting its financial plan and continuing viability.

31/ NewSouth could not provide service to the branch offices or ATM locations utilizing resale because it would not be economically feasible and some customers require custom routing which is not available via resale.

32/ *See, e.g., Local Competition Order* ¶ 11.

1. New Technology May Eventually Enable NewSouth to Migrate UNEP Customers to its Own Switch Platform, but Formidable Technical Issues Remain

NewSouth is investing in new technologies that it hopes will eventually enable it economically to migrate customers off of UNEP, or in some cases upgrade the customer to DS1 service. (NewSouth would still utilize unbundled loops or EELs to reach these customers.) NewSouth is exploring the use of micro switches that would be collocated in incumbent LEC central offices. Micro switches contain both circuit switch technology and packet switch technology on a stand-a-lone basis – unlike a traditional remote circuit switch which is dependent on a host circuit switch.

Micro switches would be capable of switching local voice traffic directly from the collocation site in which they were deployed, and thus avoid the need to backhaul such traffic to NewSouth's main switches. NewSouth estimates that approximately seventy percent of its customers calls terminate in the same exchange. If NewSouth can switch these calls at the edge of its network by placing micro switches in its collocation space, rather than having to haul this traffic to one of NewSouth's main switches, NewSouth could materially reduce its transport cost. Moreover, the use of micro switches would allow NewSouth to install smaller and cheaper equipment at the customer's premises. It is through the anticipated savings in backhauling traffic, coupled with less costly equipment that would need to be installed at the customer's premises, that NewSouth could economically migrate UNEP customers onto its own switching platform by using micro switches.

Moreover, with cost savings from the use of micro switches, NewSouth hopes it will be economically feasible to sell broadband services to at least some of its UNEP customers utilizing unbundled DS1 loops as it does now with larger business customers. Thus, with micro switch technology, coupled with the continuing availability of reasonable access to unbundled DS1 loops or DS1 EELs, NewSouth will be able to bring advanced services to even more customers.

Unfortunately, the micro switch technology that NewSouth is investigating is not currently ready for commercial deployment. NewSouth is working with the equipment vendors to address a variety of issues. For example, softswitch technology is not fully CALEA compliant. Moreover, there are a number of other features and functions that customers now expect and which are provided over exiting digital circuit switches, but which are still being implemented for micro switches. Pending the deployment of this technology, the only way NewSouth can serve its smaller business customers is through UNEP.

2. <u>In Order to Replace UNEP with Micro Switch Technology, NewSouth Must Have Access to Local Loop and Transport Facilities, Including Multiplexing Equipment</u>

Assuming that the technical issues can be addressed and micro switches deployed, NewSouth would nevertheless still require access to unbundled network elements, specifically unbundled loops or EELs, in order to migrate customers from UNEP. Moreover, because these customers are smaller businesses, for example, those requiring only two, three or four lines, NewSouth would reach them through unbundled DS0 loops – rather than unbundled DS1 loops that NewSouth uses to reach bigger customers that need at least 10 to 12 lines.

Additionally, for those customers that would be served by micro switch technology but who do not subtend the end office in which the softswitch would be collocated, NewSouth must have access to unbundled transport and associated multiplexing and/or concentration equipment. In order to reach customers located in end offices where the micro switch is not collocated, NewSouth must have access not only to the DS0 unbundled loops from the end office serving the customer, but also to multiplexing/concentration equipment at that end office that would aggregate the DS0 local loops onto a DS1 transport facility that would then carry the traffic from the end office to the wire center in which the softswitch is collocated. This multiplexing equipment must also be made available as a UNE. This aggregation capability is necessary to achieve efficiencies.[33] The Commission can take a large step toward facilitating UNEP migration and assisting facilities-based service by making local loop and transport facilities, including multiplexing equipment, available as UNEs.

C. Eliminating Unbundling Obligations Would Have a Serious Economic Effect on NewSouth and May Preclude Its Ability to Continue Serving Its Customers

[redacted]

[redacted]

33/ Multiplexing DS0 loops on a DS1 transport facility is different than the EELs NewSouth currently uses, which, as noted, consists of a DS1 loop and a DS1 transport facility. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

IV. THE COMMISSION MUST ENSURE THAT THE UNES IT IDENTIFIES IN THIS PROCEEDING ARE TRULY AVAILABLE

As important as it is to identify which network elements must be unbundled, it is equally important that the Commission clarify, confirm, or, if necessary, revise its rules to ensure that competitive carriers can actually obtain access to them. Thus, as the Commission reviews it unbundling rules, NewSouth submits that several steps should be taken to ensure that the network elements that the Commission determines meet the impairment analysis are actually available in the real world. One such step is clarifying when incumbent LECs can reasonably claim UNEs are unavailable due to new construction. Subsumed within that issue is the question raised in the Notice concerning an incumbent LEC's obligation to attach electronics to derive

[redacted]